United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7146

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7146

DAVID GOLDBERG, suing derivatively in right and for the benefit of UNIVERSAL GAS & OIL COMPANY, INC.,

Plaintiff-Appellant,

—against—

YAACOV MERIDOR, MILA BRENER, DAVID MERIDOR, S. ERELL, GIDEON BEN AARON, ARA A. CAMBERE, H. STRUVE HENSEL, HAIM RAFAELI, MARTIN SIEM, JACOB SUTTON, HENRY A. SINGER, MARITIMECOR, S.A., MARITIME FRUIT CARRIERS COMPANY, LTD., HORNBLOWER & WEEKS, HEMPHILL NOYES, INC., LAVENTHOL & HORWATH a/k/a LAVENTHOL KREKSTEIN, HORWATH & HORWATH, DR. JACOBO DAMM, DR. MAX LEBEDKIN, ELIE HOUSMAN, H. L. FEDERMAN, WILLIAM J. FRIEDMAN, MERRIL M. HALPERN, PER HYSING-DAHL, ANDRE MONTELL, FRITZ KONIG, ZEV LEVIN, RAYMOND CALIEZI,

Defendants-Appellees,

—and—

UNIVERSAL GAS & OIL COMPANY, INC.,

Nominal Defendant.

UNITED STATES COURT OF APPEALS
FILED
JUN 6 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

APPEAL FROM JUDGMENT OF UNITED STATES DISTRICT COURT DISMISSING PLAINTIFF'S AMENDED COMPLAINT

REPLY BRIEF OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID GOLDBERG, suing derivatively in the right and for the benefit of UNIVERSAL GAS & OIL COMPANY, INC., Plaintiff-Appellant, -against- YAACOV MERIDOR, et al., Defendants-Appellees, -and- UNIVERSAL GAS & OIL COMPANY, INC., Nominal Defendant.	Docket No. 77-7146

REPLY MEMORANDUM OF PLAINTIFF-APPELLANT
DAVID GOLDBERG

This brief reply memorandum is submitted on behalf of plaintiff Goldberg.

The focal point of the amended complaint is the transfer of UGO stock for Maritimecor's assets and liabilities, not assets alone as referred to by defendants (Brief pp. 3,4). Defendants nowhere dispute the fact that disclosure of the amounts and values of Maritimecor's assets and liabilities and the value of the UGO stock was never made to the public or the minority shareholders. Moreover, they don't dispute that the only two

press releases discussing the transfer were misleading in failing to disclose these facts, as well as the fact that Maritimecor's liabilities exceeded its assets, the conflicts of interest of the participants, and in implying that independent business judgment was used in entering into the transaction. We submit that this shows deception and nondisclosure.*/

Santa Fe v. Green, ___U.S.___ 51 L. Ed. 2nd 480,97 S. Ct. 54 (1977) does not preclude Goldberg's position. In Santa Fe, at Point III, the Court stated that the case was premised on a complaint that failed to allege a material misrepresentation or material failure to disclose. There is no such concession in the instant case. Further, the facts in Santa Fe are completely different. In Santa Fe the Court specifically found that the minority shareholders "were furnished with all relevant information on which to base their decision." Defendants here nowhere dispute that relevant information was not furnished to the minority shareholders.

Defendants argue that even assuming deception of the minority shareholders there can be no valid Rule 10b-5 cause of action because that deception is not causally linked to any damage to UGO. (Brief pp. 1,4 and 8). They point out that no

*/ Contrary to defendants' arguments at p. 5 of their brief Goldberg raised, although did not emphasize, failure to disclose and deception of minority shareholders in opposition to the motion for security for costs. In quoting from Goldberg's brief defendants' failed to include the first sentence of the very next paragraph which states:

> "Clearly if one wants to look for deception the minority shareholders were 'deceived' because they were never told the details of the transaction, to wit the value of the assets and the extent of the liabilities of Maritimecor that UGO was getting."

action by the minority shareholders was sought or needed for the transfer of Maritimecor's assets and liabilities for UGO's stock because defendants, through Maritimecor, owned seventy-eight percent (78%) of UGO's stock.

That same argument was raised and rejected by this Court in Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2nd Cir. 1974), cert. denied, 421 U.S. 976 (1975), where the majority used a proxy statement containing false statements to support a merger. The argument was made that there was no causal link because "the insiders with a conflict of interest had enough votes to approve the transaction in any event." (p.382). The Court rejected the argument and, at p. 384, said that the intent of the regulatory scheme is to have an informed market "so as to permit well-based decisions about buying, selling and holding the securities involved in the transaction", and further, that disclosure might cause those in control to either modify or reconsider the terms of the merger. Santa Fe. v. Green, supra, is not contrary although at footnote 14 to its opinion, the failure to give advance notice of the merger was said not to be a material deception. That is not the same as not disclosing the facts and circumstances of the merger itself, particularly where the Delaware statute did not require advance notice.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-7146

David Goldberg, et al

v.

Yaacov Meridor, et al

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 6th day of June, 1977, deponent served the within Reply Brief for Plaintiff Appellant upon See Attached List

Attorney(s) for the See List in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 6th day of June 197 7

Edward A Quimby

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Notary Public, State of New York
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